

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001


COMPETITIVE PRODUCT LIST)	Docket No. MC2013-57
ADDING ROUND-TRIP MAILER)	
COMPETITIVE PRODUCT PRICES)	Docket No. CP2013-75
ROUND-TRIP MAILER (MC2013-57))	

**ANSWER OF GAMEFLY, INC., TO
CHAIRMAN'S INFORMATION REQUEST NO. 1, QUESTION 5(c)**

(January 17, 2014)

GameFly, Inc., ("GameFly") respectfully submits the attached response to Chairman's Information Request No. 1, Question 5(c) (issued December 18, 2013). Although the question was addressed to the Postal Service, Question 5(c) raises an important legal question that warrants a response by the Postal Service's customers as well as the Postal Service itself.

Respectfully submitted,



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Question 5. The Request at page 3 states that the new Round-Trip Mailer product would replace the existing First-Class Mail round-trip mailer option on the market dominant product list, and that there would exist only one set of equalized rates for round-trip DVD mailers, regardless of shape:

- a. Please state whether DVD customers eligible for the new Round-Trip Mailer product will also be able to send DVDs round-trip via First-Class Mail.
- b. If so, does the Postal Service intend to assess the non-machinable surcharge on mailpieces that are not automation compatible?
- c. If the answer to subpart a. is yes and the answer to subpart b. is no, please confirm that the applicable First-Class Mail rates will constrain the price of the new Round-Trip Mailer product. If not confirmed, please explain.

GameFly Answer:

If DVDs can be mailed as ordinary First-Class letter mail, and the Postal Service continues to provide high levels of manual processing to Netflix DVD mail, the applicable First-Class letter rates will constraint the price of the new, deregulated round-trip DVD mailers product for Netflix.

The same will not be true for GameFly and other disfavored customers. Because the use of First-Class letter mail by these customers would result in an "epidemic of cracked and shattered DVDs," *GameFly, Inc. v. PRC*, 704 F.3d 145, 149 (D.C. Cir. 2013), the least expensive viable First-Class product for these customers would be flat-shaped First-Class Mail. Without continued price equalization of flat-shaped and letter-shaped First-Class round-trip DVD mail, the former would again become more expensive than the latter, and would not constrain the price of the new "competitive" round-trip DVD mail product to the

price of letter-shaped First-Class mail. Hence, the continued availability of ordinary First-Class letter mail as an alternative vehicle for distributing DVDs could enable the Postal Service to resurrect the very discrimination that the Court of Appeals and the Commission prohibited in *GameFly, Inc. v. PRC*, 704 F.3d 145 (D.C. Cir. 2013), and Order Nos. 1763, 1807 and 1828.

Furthermore, if the Postal Service's answer to subpart 5(a) is "yes," the risk of renewed discrimination will be present regardless of whether the answer to subpart 5(b) is yes or no—i.e., whether the Postal Service assesses "the non-machinable surcharge on mailpieces that are not automation compatible." To confirm this, assume that the Postal Service (1) transfers DVD mailers to a new competitive product, (2) allows mailers to continue sending and receiving DVDs as ordinary First-Class letters and flats, (3) continues to offer Netflix levels of manual processing to Netflix, but to no other DVD rental company, (4) assesses the non-machinable surcharge on DVD's mailed as ordinary First-Class letters, and (5) sets the price of the new competitive product *above* the price of ordinary First-Class letter mail plus the nonmachinable surcharge. In this circumstance, the least expensive way for Netflix to avoid automated letter processing would be to mail its DVDs as ordinary First-Class Mail; the least expensive way for GameFly and other disfavored customers to avoid automated letter processing would be to use the new "competitive" round-trip DVD mail product. If the price of the latter is higher than the price of the former (including the nonmachinable surcharge), the unlawful discrimination against GameFly will be back in force.

Moreover, unlawful discrimination would occur even if the price of the “competitive” round-trip DVD mail product were equal to the price of ordinary First-Class letter mail plus the nonmachinable surcharge. As Netflix has noted, First-Class Mail is sealed against inspection; this is a valuable feature of First-Class Mail that the proposed round-trip DVD mail product would not include. Reply Comments of Netflix, Inc. (August 22, 2013) at 5-7; Response of GameFly to Netflix Reply Comments (August 29, 2013) at 2-3. Allowing Netflix to obtain manual processing of DVD mail entered as ordinary First-Class letters, even at a price (including a non-machinable surcharge) equal to the price of the “competitive” round-trip DVD mailer product, would unlawfully discriminate against GameFly and others by effectively depriving them of the opportunity to obtain the same protection against inspection.